No. 15637

United States Court of Appeals

For the Ninth Circuit

MARINE COOKS & STEWARDS, AFL, a voluntary association, JAMES O. WILLOUGHBY, *et al., Appellants*

vs.

PANAMA STEAMSHIP CO. LTD., a corporation, *et al., Appellees*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

PETITION FOR REHEARING

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

PETITION FOR REHEARING

The appellants petition this Honorable Court for rehearing in the above-entitled case.

A. GROUNDS OF PETITION

The grounds for this petition are as follows:

(1) The decision herein is contrary to the decision of the United States Supreme Court in *Romero v. International Terminal Operating Co.,* 3 L.Ed.2d 368.

Argument heretofore on this point was limited to whether this court ought to concur with the decision of the First Circuit in *Doucette v. Vincent,* 194 F.2d 834. This court's decision proceeds on reasoning not advanced by appellees. As to this, the court's decision and this petition embrace new matters.

(2) The decision erroneously holds that defendants'

conduct in peacefully picketing was unlawful. As the jurisdiction of the district court is predicated exclusively on maritime law, the federal law is the sole measure of the legality of defendants' conduct. Defendants' conduct constituted only peaceful picketing not forbidden by any federal statute or decisional law and protected as free speech under applicable decisions of the United States Supreme Court.

(3) The decision incorrectly holds that the Norris-LaGuardia Act doesn't apply to picketing of a foreign vessel. A federal court sitting in equity is prohibited under the Norris-LaGuardia Act from issuing an injunction and that act makes no exception for foreign owned vessels.

(4) The decision holding the Norris-LaGuardia Act inapplicable fails to mention facts which establish American control of the S.S. NIKOLOS, the picketed vessel. In the *Benz*[1] case, there was no American connection except that a dispute between the vessel's owners and her crew erupted in an American port. The facts in the present case show that an American owned corporation chartered (that is, rented) the S.S. NIKOLOS in order to carry out a contract of carriage entered into by another American owned corporation. Other facts relating to American interest and control also appear in the record and are not mentioned in the decision.

B. ERRATA

The court's statements in paragraphs 2 and 3 of the opinion that the question of the district court's primary jurisdiction was not raised until the second hearing are

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[1]*Benz v. Compania Naviera Hidalgo, S.A.*, 335 U.S. 138 (1957).

erroneous, and although we do not regard this as grounds for rehearing, we request that the matter be corrected. This matter is covered in Appendix A.

C. ARGUMENT

I.

The Instant Decision Is Contrary to *Romero v. International Terminal Operating Co.*, 3 L.Ed.2d 368.

There are several points on which there is no disagreement. These are:

(1) If there is a cause of action in this case, it is one for a maritime tort. The majority opinion says:

> "* * * Appellees' cause of action is based on interference with maritime traffic on navigable waters and on interference with the performance of a maritime contract constituting maritime torts." (emphasis supplied)

The concurring opinion says:

> "Here the relief sought was injunction *against a maritime tort.*" (emphasis supplied)

(2) Appellees' sole claim to jurisdiction rests upon 28 U.S.C.A. § 1331, giving the United States District Court jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States. This is acknowledged by the opinion "Appellee rests his claim of jurisdiction on 28 U.S.C.A. § 1331 * * * . "

(3) The United States Supreme Court has held in the *Romero* decision that an action at law cannot be brought under § 1331 on the civil side of the court on a cause of action for maritime tort.

This court now concludes that an action on the civil

side of the court in equity rather than at law based on a maritime tort can be brought under § 1331.

The *Romero* decision, in explicit language, rejects the theory that the jurisdiction of the United States District Court under § 1331 is greater if the action be in equity than if it be at law.

In *Romero,* the remedy asked for a maritime tort was a common law remedy of trial by jury and judgment. In the instant case, the remedy sought is in equity by way of an injunction against a claimed maritime tort.

That the sole ground of distinction by the court between this case and *Romero* is the difference in the remedy sought is made abundantly clear in both the majority and the concurring opinions. In the majority opinion the court says:

> "This is an action for an injunction, and admiralty at no time has had jurisdiction of such actions."

The concurring opinion says:

> "Relief of that character (injunction) is wholly unknown to an admiralty court."

The Supreme Court pointed out clearly, definitely and conclusively in the *Romero* decision that if what was involved was a maritime claim, i.e., a maritime tort, it was a case of admiralty and maritime jurisdiction. The court also specifically pointed out that this was so regardless of the remedy sought by the pleader. This language is to be found in Footnote 23 to the majority opinion in the *Romero* decision.

> "All suits involving maritime claims, *regardless of the remedy sought,* are cases of admiralty and maritime jurisdiction within the meaning of Ar-

> ticle 3 whether they are asserted in the Federal courts or, under the saving clause, in the state courts." (emphasis supplied)

The reasoning of this court is that although there is a "Federal question" because a maritime tort is involved, this is not a "case of admiralty and maritime jurisdiction" as that language is used in §1333 or the Constitution but is instead an action in equity because an injunction is sought. What this reasoning overlooks is that there is no grant of jurisdiction to the United States District Courts over "maritime torts" as such. The only grant of jurisdiction is by the Constitution and §1333 and is limited to "cases of admiralty and maritime jurisdiction." To deny that this case is a "case of admiralty and maritime jurisdiction" is therefore to deny that it falls within any Constitutional grant of judicial authority to the Federal courts.

The majority decision states: "We emphasize, this is not an action 'saved' from the exclusive jurisdiction of admiralty; it is one not cognizable in admiralty." If this be so, the plaintiffs here had no Federal claim at all, for their only claim to Federal jurisdiction is that the case *is* cognizable in admiralty. The Supreme Court made this same observation also in Footnote 23 to the majority opinion in *Romero,* saying:

> "Without that Constitutional grant *Romero* would have no Federal claim to assert."

In *Romero,* the plaintiffs sought a jury trial not available in admiralty and for that reason urged jurisdiction on the law side of the Federal Court where a jury trial would be available. Similarly, plaintiffs in our case seek an injunction not available in admiralty and

base their claim for jurisdiction on the law side solely because only there may the remedy of injunction be given. Jurisdiction is not conferred in such a fashion.

When a litigant sues in the United States District Court and claims jurisdiction of that court under §1331, he must point to the Constitutional provision or law of the United States out of which his case arises. Here appellees and this court both point to the jurisdiction of the district courts over maritime torts. The only jurisdiction over maritime torts is given by Article III, Clause 2 of the Constitution and §1333 of the Judicial Code granting jurisdiction over "cases of admiralty and maritime jurisdiction." In order to remove this case from the restrictions of the *Romero* decision, both the majority and the concurring opinion state that this is not "a case" of admiralty and maritime jurisdiction within the provisions of §1333. In so doing, the court then denies any jurisdiction in the district court whatsoever. For, as pointed out by the Supreme Court in the above-mentioned footnote, without that Constitutional grant to the district courts and without a claim under it, the plaintiff has no Federal claim to assert.

The result here reached by the court is that if the remedy sought on a maritime tort is the equitable remedy of an injunction, the jurisdiction of the district court under §1331 is different and greater than a similar action on the civil side of the court seeking a common law remedy on a maritime tort. Congress made no distinction in §1331 between the jurisdiction of the court sitting in equity or sitting in law. The statute presently grants jurisdiction to the court of "all civil

actions * * *." however, in the original Act of 1875 as quoted by the Supreme Court at page 379 of its decision and as quoted by the majority opinion herein, the Act granted jurisdiction over "suits of a civil nature at common law or in equity." The jurisdictional grant of the statute was identical and equal as to actions in equity and at law. The change to the words "all civil actions" was made solely because of the adoption of Rule 2 of the Federal Rules of Civil Procedure abolishing the distinction between actions at law and in equity. See revisor's notes to 28 USCA §1331.

Congress knows how to give, and in at least one other instance has given, greater jurisdiction to the United States District Courts sitting in equity than it gave to them sitting at law. See the so-called interpleader statute, 28 USCA §1335.

Since the jurisdiction of the court is equal and indistinguishable, whether sitting in law or in equity under §1331, when a litigant applies to the United States District Court for relief claiming jurisdiction under that statute, he must point to that part of the Constitution or those laws or treaties of the United States under which he claims his case arises. In the *Romero* case, the Supreme Court has said that when he claims jurisdiction under §1331 he cannot point to the maritime law because that involves a wholly separate and distinct class of cases not contemplated by §1331.

The result then must necessarily follow that the plaintiffs' claim to jurisdiction under §1331 must fail.

We respectfully submit that the court erred in concluding and holding that the case was one of Federal

maritime law cognizable by the Federal courts, separate and apart from the grant of jurisdiction to those courts of "cases of admiralty and maritime jurisdiction" under the Constitution and Section 1333. Absent diversity a litigant with a claim under maritime law must either claim jurisdiction under that language or there is no Federal jurisdiction at all. Under the grant of jurisdiction by Congress, no distinction has been made between law and equity, and the Supreme Court has said there is none. Hence on this point alone this case should be remanded to the United States District Court for dismissal or for transfer to the admiralty side with a vacation of the injunction, the choice between dismissal and transfer to be at the option of the plaintiffs.

II.

The Decision Erroneously Holds That Defendants' Conduct in Peaceful Picketing Was Unlawful Under Substantive Federal Law.

The court's decision more or less assumes the basic violation of some Federal law by the defendants' peaceful picketing. The only direct reference in the opinion is that this is an interference with the performance of a maritime contract and thus, according to Footnote 3 should be cognizable in admiralty because admiralty takes cognizance of "every species of tort."

While appellants concede that any case of maritime tort is cognizable in admiralty, no case has been cited to the effect that peaceful picketing constitutes a maritime tort nor do appellants know of any such decision.

Insofar as appellants' conduct in peaceful picketing

might otherwise have been deemed to be unlawful under maritime decisional law, such conduct is immunized against any such charge of illegality by virtue of the Constitutional protections of the right of free speech accorded to peaceful picketing and by the Clayton Act, 29 U.S.C.A. §§51, 52, 53.

The right here of the appellants to peacefully picket falls squarely within the Constitutional protection as enunciated in *A. F. of L. v. Swing,* 312 U.S. 568. There the court said:

> "All that we have before us, then, is an instance of 'peaceful persuasion' disentangled from violence and free from picketing 'en masse or otherwise conducted' so as to occasion 'imminent and aggravated danger.' *Thornhill v. Alabama,* 310 U.S. 88, 105."
>
> * * * * * * * *
>
> "The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ. Communication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred because of concern for the economic interests against which they are seeking to enlist public opinion than could the utterance protected in Thornhill's case."

Of course, the United States Supreme Court has subsequently stated in cases exemplified by *Building Service Employees International Union v. Gazzam,* 339 U.S. 532, that the right of free speech must be equated with the powers of the states and where picketing, albeit peaceful, violates some overwhelming policy of a state, the state may in a limited degree constitutionally prohibit picketing in violation of that policy.

Here, however, the overwhelming policy of Federal law, upon which appellees rely, legalizes, rather than makes unlawful, the appellants' conduct. The point is made in the next section to follow that the Clayton Act is still the substantive law of the United States and gained new life from the policy declarations of the Norris-LaGuardia Act. That the Clayton Act here makes the appellants' conduct lawful is made abundantly clear by *U. S. v. Hutcheson,* 312 U.S. 219. In Footnote 1 to that opinion, the Supreme Court quotes the statute in full, the last sentence of which, referring to peaceful picketing, reads as follows:

> "****nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

The court said at pages 235, 236, of that opinion:

> "The relation of the Norris-LaGuardia Act to the Clayton Act is not that of a tightly drawn amendment to a technically phrased tax provision. The underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction. This was authoritatively stated by the House Committee on the Judiciary.
>
> " 'The purpose of the bill is to protect the rights of labor in the same manner the Congress intended when it enacted the Clayton Act, October 15, 1914, 38 Stat. L. 738, which act, by reason of its construction and application by the Federal courts, is ineffectual to accomplish the congressional intent.' H. Rep. No. 669, 72d Congress, 1st Session, p. 3. The Norris-LaGuardia Act was a disapproval of

Duplex Printing Press Co. v. Deering, supra, and *Bedford Cut Stone Co. v. Journeyman Stone Cutters' Association,* 274 U.S. 37, 47 S.Ct. 522, 71 L.Ed. 916, 54 A.L.R. 791, as the authoritative interpretation of §20 of the Clayton Act, for Congress now placed its own meaning upon that section. The Norris-LaGuardia Act reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later Act. *In this light §20 removes all such allowable conduct from the taint of being 'violations of any law of the United States' including the Sherman Law."* (Emphasis supplied)

The Clayton Act applies to foreign corporations because in its section on definitions it includes them. 29 U.S.C.A. §53, *infra,* p. 9.

III.

The Norris-LaGuardia Question

Our third and fourth points will be discussed together. The court rather peremptorily disposes of the Norris-LaGuardia question by reliance upon the *Benz* case. Appellants claim that the *Benz* decision is not applicable in holding or in reasoning, and also is distinguishable on its facts. The substantive law applied in *Benz* was the law of Oregon, with jurisdiction based on diversity. It was claimed this conflicted with the Taft-Hartley Act on the theory that the Taft-Hartley Act was applicable and preempted the field. The holding of the court in that case is no wise applicable to this case where the admiralty law of the United States, and not the law of a state, is conceded to be the governing law and, regardless of the applicability or non-

applicability of the Taft-Hartley Act to the substantive rights of the parties, the question here is whether the Norris-LaGuardia Act provides a limitation on the remedy which a district court may provide in an action based on a claimed maritime tort. This case is also distinguishable from *Benz* on its facts. The Supreme Court in that case said:

> "The only American connection was that the controversy erupted while the ship was transiently in a United States port and American labor unions participated in its picketing."

The record in the trial court, although brief and incomplete, establishes beyond question that here an American corporation, National Bulk Carriers, controlled the operation of the S.S. NIKOLOS and employed it here in an operation basically American.

The appellant union's dispute is with those who control the contract for the carriage of salt between Mexico and Tacoma and thus is a dispute between an American union and an American-owned enterprise. The facts in the record which demonstrate this now follow.

Transea Carriers, which has the contract to haul, while a foreign corporation, is wholly owned by an American steamship company, National Bulk Carriers (Tr. 90). Transea's contract to haul is with another American corporation, the Hooker Electrochemical Company of Tacoma, Washington. Transea in turn has a contract of affreightment with Seatankers, Inc., a plaintiff in this case (Tr. 90), which is likewise a wholly-owned subsidiary of National Bulk Carriers, an American corporation (Tr. 90). Seatankers, Inc., in

turn chartered the vessel NIKOLOS from the North Atlantic and Gulf Steamship Company whose corporate status the witness did not know but which, from its name, is presumably American (Tr. 90). The North Atlantic and Gulf Steamship Company in turn hired the NIKOLOS from the Panama Steamship Company, a foreign corporation. The routine voyage of the vessel under this contract would be primarily in American waters hauling salt from the Black Warrior Lagoon in Mexico, a mere 400 miles south of San Diego up the American coastal waters to the port of Tacoma. Yet in the majority opinion the court said that it could find no greater interest here residing with the American union than in the *Benz* case where a vessel, without any known American relationship, on a truly foreign voyage happened into an American port.

Other facts establish the essentially American background of this dispute and show that the incidental foreign aspects have been overemphasized. The trial court found:

> "As a result of the engagement in this trade by the plaintiffs in vessels of foreign registry, *vessels of American* registry and operated and *manned under contracts with the defendant unions* have lost or will lose such business with resultant *loss of employment to members* of defendant labor organizations." (Findings of Fact XXIV, Tr. 36, 37) (Emphasis supplied)

This finding was based upon the uncontradicted statement in the affidavit of James O. Willoughby reading as follows:

> "The affiant also learned that due to the procuring of said employment by the S.S. NIKOLOS,

> the S.S. Ira Nelson Morris, a vessel operated by a company affiliated with the Pacific Maritime Association, namely Coast Wise Lines, and under contract to the M.C.S., lost said business and was tied up and rendered inactive in the port of San Francisco and laid off its crew, some of whom were members of M.C.S." (Tr. 25, 26)

In *Benz,* defendant unions argued that the Federal Court had no jurisdiction to award damages on the basis of state law, claiming that the Taft-Hartley Act provided an exclusive remedy. The Supreme Court did not decide in the *Benz* case that the conduct of defendant unions was totally unregulated by the Taft-Hartley Act. The Taft-Hartley Act unquestionably applied to the conduct of defendant unions in the *Benz* case, but the Taft-Hartley remedy was not exclusive. This court bases its conclusion that Norris-LaGuardia does not apply here on its assumption that the Taft-Hartley Act does not apply. This assumption is not justified. The National Labor Relations Board, under somewhat similar circumstances, considered a claim that similar peaceful picketing was unlawful under the Taft-Hartley Act. *Moore Dry Dock Co. and Sailors Union of the Pacific,* 92 NLRB 547. The jurisdiction of the N.L.R.B. was there invoked by an American employer claiming the picketing as a result of a dispute between the American union and a foreign shipowner violated the secondary boycott prohibitions of the Taft-Hartley Act. The Board found that the picketing was not unlawful. The application of other sections of the Taft-Hartley Act to disputes such as this is not free from doubt. *Peninsular and Occidental Steamship Co. v. Seafarers International Union,* 1958 AMC 2145, 42 LRRM 1113,

120 NLRB No. 147. The concurring opinion in *Building Trades Council v. Garmon,* ..... U.S. ....., decided April 20, 1959, suggests that the Taft-Hartley Act may have applicability sufficient to preclude state court injunctions without ousting such courts of power to award damages, although in that particular case the court held both were precluded.

Any person may file a charge with the N.L.R.B. (N.L.R.B. Rules and Regulations, paragraph 1115.09). Certainly the American corporations here involved could invoke the jurisdiction of the N.L.R.B.

Finally, the court, as we have pointed out in detail above, incorrectly assumes that this present dispute is not "concerned with industrial strife between American employers and employees" (353 U.S. at 143). The contrary is true.

Thus, it is seen that the factual basis which impelled the Supreme Court to conclude that the Taft-Hartley Act did not pre-empt applicability of State law in the *Benz* situation does not exist here. The factual situation here is more akin to the cases in which the Taft-Hartley Act has been applied to the rights of the parties.

Wholly apart from this, appellants insist that the reason which impelled the United States Supreme Court to hold that the Taft-Hartley Act was not exclusively applicable in *Benz* to govern the substantive relationships of the parties do not exist to hold that the Norris-LaGuardia ban on injunctions against peaceful picketing should not apply. On the contrary, whereas it is easy to find policy reasons justifying the refusal to

impose substantive law on transactions containing an element of foreign interest, there is no equal policy pertaining to the grant of injunctions and, to the contrary, the overwhelming policy considerations of the Constitutional protections of the right of free speech as applied to labor disputes and the declarations of policy by Congress are overwhelmingly against injunctions in the Federal courts prohibiting peaceful picketing.

The majority opinion expresses concern lest there be "no Federal agency or court in which foreign commerce could seek protection" meaning, by protection, an injunction because no one denies the right of shippers, foreign or otherwise, to bring actions for damages for torts or breach of contract. No law or Constitutional provision establishes a policy that there has to be a Federal agency in which an injunction against peaceful picketing will lie. In fact since 1914 Congress has been striving mightily to persuade, if not direct, the Federal courts to get out of the injunction business in labor relations. Its effort in proclaiming a prohibition against such injunctions in the Clayton Act was held to be a useless exposition of current law in *American Steel Foundries v. Tri-City Central Trades Council,* 257 U.S. 184, 66 L.Ed. 189. In 1932, to avoid this emasculation of Congressional purpose by the courts Congress passed the Norris-LaGuardia Act. *United States v. Hutcheson,* 312 U.S. 219. In doing so it exercised its power, not over commerce, but over the jurisdiction of the district courts to issue injunctions in cases involving labor disputes. It made no exceptions for foreign or interstate commerce.[2]

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[2]The courts are given only such jurisdiction over foreign or interstate

Co-extensive with this limitation on the jurisdiction of the courts there is in effect a statute of Congress specifically spelling out the jurisdiction of the district courts over Congressional enactments regulating commerce. Title 28, §1337 reads as follows:

> "The district courts shall have original jurisdiction of any civil action or proceeding arising out of any act of Congress regulating commerce * * *."

Thus, Congress had the opportunity not only in the passage of the Norris-LaGuardia Act but in this section also to grant to the United States District Courts special jurisdiction to issue injunctions in cases involving foreigners doing business here. It did not do so.

So also in the National Labor Relations Act, 29 U.S.C.A. §151*ff*, and the Labor Management Relations Act of 1947, 29 U.S.C.A. §151*ff* (sometimes called the

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commerce as is specified by the Constitution or the laws of Congress. No special Constitutional or statutory grant to general protection of foreign commerce exists. The trial court by repeated reference to commerce with friendly foreign nations apparently thought otherwise. For example, the court said:

> "Now, the point of our case is that because we have international obligations involved here of paramount importance to the welfare and security of the nation, particularly at this critical time in world history, the interference with wholly lawful activities of the commerce of a friendly foreign power are unlawful, and therefore, regardless of how well founded or grounded the reasons for employing that unlawful conduct, the court has the power and the duty to restrain it." (Tr. 122, 123)

The court points to no authority, statutory or decisional, which sustains this statement enlarging the jurisdiction of the district courts. The courts' jurisdiction is not enlarged by the international obligations of the United States except insofar as by statute the district court is given jurisdiction to enforce them and no such statute is pointed to here. Neither is the courts' jurisdiction enlarged, as the trial court thought, because this is a critical time in world history. Nor, of course, does it matter that the commerce is with a friendly or unfriendly foreign power for we are not at war and the war powers or defense powers of the United States are not here relied upon.

Taft-Hartley Act), both of which were comprehensive acts dealing with labor relations, Congress specifically and carefully spelled out the jurisdiction of the district courts to grant injunctions and again did not grant jurisdiction to issue injunctions at the suit of private parties but provided that they could be granted only at the behest of the National Labor Relations Board. In all of the acts mentioned since 1914, both those which were based on Congress' power over the jurisdiction of the courts, *i.e.,* the Clayton Act, the Norris-LaGuardia Act, and §1337 (Title 28 U.S.C.A.) as well as those based on Congress' power to regulate commerce, to-wit, the Clayton Act, the National Labor Relations Act, and the Labor Management Relations Act of 1947 there is no indication that the jurisdiction of the United States District Court to grant an injunction in a labor dispute is any greater if one of the plaintiffs is a foreigner than if all the plaintiffs are American.

The majority opinion states that the denial of an injunction should not result without more explicit direction from Congress. The burden of pleading and proving the jurisdiction of the United States District Court to issue an injunction is on the plaintiff, here the appellee. Not one word in any statute or any decision cited by the appellee has indicated in any way that the jurisdiction of the Federal court to issue an injunction is any greater because a foreigner is a party.

In stating that the Clayton Act was merely expositive of the existing law, the *Tri-City Foundries* case did not invalidate the Clayton Act, but left it as a live declaration of Congressional policy. This declaration is to be construed with and lends body to the Norris-LaGuardia

Act which was intended to overcome the technical, restrictive interpretation of the Clayton Act. That the Clayton Act applies to foreign corporations, as well as domestic, is made specific by the following section of the Act:

> "The word 'person' or 'persons,' wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the territories, the law of any state, *or the laws of any foreign country.*" 29 U.S.C.A. §53 (Emphasis supplied)

Furthermore, the Clayton Act supplements the Norris-LaGuardia Act by including within its provisions relating to peaceful picketing the following language:

> " * * * Nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States." 29 U.S.C.A. §52.

Here, as distinct from *Benz,* the appellees have sought the jurisdiction of the United States District Court, not to enforce the law of some state or foreign country, but for a claimed violation of Federal law. The quoted provisions of the Clayton Act lend substance to the argument that the Norris-LaGuardia Act was not only intended to prohibit injunctions against peaceful picketing by American unions involved in a labor dispute with any person or persons foreign or otherwise, but that even if the procedural requirements of the Norris-LaGuardia Act were met the injunction could not be based upon the ground that any law of the United States was violated.

Since the appellees claim jurisdiction solely under

§1331 on the claim that their case arises under the "laws of the United States" they are squarely confronted with the provision of the Clayton Act that peaceful picketing shall not be considered or held to be a violation of any law of the United States. The Norris-LaGuardia Act was passed to revitalize the prohibition against injunction and, as such, prohibited injunctions which would otherwise be granted under diversity jurisdiction because some non-Federal law is violated but was passed in the light, nonetheless, of the existing declaration of substantive law of the United States that in no event was peaceful picketing to be deemed a violation of any law of the United States claimed applicable in a case brought under §1331.

IV.

Conclusion

It is respectfully submitted that the appellants are entitled to a rehearing in the above entitled matter on the grounds set forth in this petition.

Respectfully submitted,

J. Duane Vance
Attorney for Appellants.

John Paul Jennings
Of Counsel

APPENDIX A

THE RAISING OF THE QUESTION OF THE JURISDICTION OF THE DISTRICT COURT.

We here review the manner and method of raising the question of the primary jurisdiction of the District Court.

In appellants' opening brief in this court we pointed out that the plaintiffs below had not made clear the basis on which they sought to invoke the jurisdiction of the court nor had the trial court elucidated or indicated its opinion on its jurisdiction. On page 1 of the appellants' brief we said,

> "The basis upon which jurisdiction of the court below was invoked was not stated in the pleading of appellees or the court's findings, conclusion or order * * *."

Since the burden of pleading and proving the court's jurisdiction rests upon the party invoking that jurisdiction a statement that plaintiff has not done so surely raises the question. The opinion cites cases asserting this rule relating to the burden of establishing jurisdiction.

Appellee's answering brief for the first time brought forth a clear statement of appellees' theory of jurisdiction. Appellees conceded that they were relying on Section 1331 (Title 28 U.S.C.A.). Once this claim was made clear appellants stated in the reply brief, page 1,

> "Appellees have clearly failed to allege and prove the jurisdiction of the district court."

In support thereof at pages 2 and 3 of the reply brief,

we cited the cases of *Jordine v. Walling,* 3 Cir., 185 F.2d 165, and *Modin v. Matson Navigation Co.,* 9 Cir., 128 F.2d 194. As to Section 1331, on which appellee relied, we said:

> "The 'term laws of the United States' as used hereunder, applies only to acts of Congress and not to common law or admiralty decisional law."

Appellees then served and filed a "Supplemental Brief of Appellees" copies of which were served on counsel for appellants before December 14, 1957. This brief of appellee was devoted entirely to the jurisdictional question, appellee relying on and attempting to sustain, the case of *Doucette v. Vincent,* 194 F.2d 834. Thereafter pursuant to permission obtained from the Clerk of the Court on December 27, 1957, the appellants mailed to this court a brief entitled "Appellants' Reply to Supplemental Brief of Appellees." This brief in turn dealt exclusively with the question of jurisdiction under Section 1331 and the "conflicting decisions" of *Doucette v. Vincent* on the one hand, and the *Jordine, Modin* and *Paduano* cases on the other.

All of these documents were filed on or about the date stated and well in advance of the first argument hereon which was held January 15, 1958.

Thus it is established as a matter of record in this court that appellants did not rest their contentions solely on the Norris-LaGuardia Act in the first hearing and failed to raise it until the second hearing as the court has stated. Furthermore, counsel's recollection is that at the first hearing the whole 45 minutes allowed counsel for the appellant was devoted to argument and

questions and answers relating to the jurisdictional question and at the conclusion of the time counsel was granted an additional two minutes to discuss the Norris-LaGuardia question.

CERTIFICATE OF COUNSEL

I hereby certify that in my judgment the above Petition for Rehearing is well founded and further certify that it is not interposed for delay.

J. Duane Vance

Attorney for Appellants.